No. 87-2132

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LEGISLATURE OF THE VIRGIN ISLANDS,
Appellant,

HELEN GJESSING, Individually and as President of Save Long Bay Coalition, Inc., LEONARD REED, Individually and as President of Virgin Islands Conservation Society, Inc., KATE STULL, Individually and as President of League of Women Voters of V.I., Inc., LUCIEN MOOLENAAR, Individually and as President of Virgin Islands 2000, Inc., RUTH MOOLENAAR, Individually and as Director of St. Thomas Historical Trust, Inc.,
Appellants,

v.

WEST INDIAN COMPANY, LTD.,
Appellee,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Appellee.

On Appeal from the United States Court of Appeals for the Third Circuit

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APPELLANT LEGISLATURE OF THE VIRGIN ISLANDS' REPLY BRIEF IN OPPOSITION TO MOTION OF APPELLEE THE WEST INDIAN COMPANY, LIMITED TO DISMISS OR AFFIRM

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Introduction

In responding to the Jurisdictional Statement of the Legislature of the Virgin Islands (the "Legislature"),

Appellee, West Indian Company, Limited ("WICO") has founded its Motion to Dismiss or Affirm on three fundamental misunderstandings: 1) the effect of the Repeal Act on the Second Addendum; 2) the effect of the Coastal Zone Management Act on WICO's title to the harbor lands in question; and 3) the legislative history of the Repeal Act and the effect of that history on WICO's title.

It is WICO's misunderstanding and misconstruction of these three pivotal factors, and the lower courts' apparent agreement with WICO's perception, that forms the basis of the Legislature's appeal. This Reply Brief will address those issues along with the jurisdictional question raised by WICO in opposition to WICO's Motion to Dismiss or Affirm ("WICO Motion").

ARGUMENT

I. THIS COURT HAS APPELLATE JURISDICTION

WICO errs in stating that this Court has determined that it lacks appellate jurisdiction over a Circuit Court of Appeals' decision invalidating a statute from a territory such as the Virgin Islands. *Fornaris v. Ridge Tool Company*, 400 U.S. 41 (1970) involved a federal court's invalidation under diversity jurisdiction of a statute of the Commonwealth of Puerto Rico. As the Court noted in detail in *Fornaris*, Puerto Rico's Spanish heritage has led to a judicial structure different from other states and territories. 400 U.S. at 42-43. This Court has even devised a unique rule of construction concerning local laws construed by a Puerto Rican court. *Id.* at 43.

Additionally, Puerto Rico has a supreme court from which appeals may be taken pursuant to 28 U.S.C.A. § 1258. The Virgin Islands has no supreme court. Its citizens must rely on the federal district and circuit courts to review legislation, as must the Legislature itself. The only possible avenue for any appellate juris-

diction in this Court from the Virgin Islands is under 28 U.S.C.A. § 1254(2). Puerto Rico is not nearly so limited. A "Puerto Rican statute is not a 'state statute' within § 1254(2)" because it does not need to be. 400 U.S. at 42 n. 1. Legislative acts of the Puerto Rican government can be reviewed by the Puerto Rican Supreme Court whose decisions can, in turn, be reviewed on appeal by this Court. *Fornaris* thus involved an entirely different situation from the instant appeal.

Without any other opportunity for appellate jurisdiction, surely the official acts of the Virgin Islands' Legislature rise to the same level as an ordinance passed by a town council, which is a "state statute" for purposes of § 1254(2) jurisdiction. *City of New Orleans v. Dukes*, 427 U.S. 297, 301 (1976). The full legislative authority granted the Virgin Islands by Congress in 48 U.S.C.A. § 1541 *et seq.* demands no less.

II. THE REPEAL ACT DOES NOT REPEAL THE SECOND ADDENDUM

WICO admits the basic proposition of the Legislature's argument when it states at page 8 of its Motion that:

> Because the Second Addendum contemplated specific revisions in the CZMA, and indeed could not be implemented without such revisions, the Second Addendum was conditioned on the enactment of appropriate enabling legislation.

Exactly. The Repeal Act did not repeal the Second Addendum, it repealed the "enabling legislation." Specifically, the Repeal Act declared that "Act No. 4700 (Bill No. 14-0664), enacted April 7, 1982, is hereby repealed in its entirety." Joint App. 175a. When the Legislature repealed Act 4700, it was repealing WICO's exemption from the CZMA, not the many other components of the Second Addendum. The other aspects of the Second Ad-

dendum are unaffected by the Repeal Act. This is especially true of the conveyance of title from the United States to WICO, because the Legislature was never a party to the quiet title action which supposedly settled the question of title.

WICO's exemption from the CZMA was the only thing the Legislature could repeal because that was the only aspect of the Second Addendum over which the Legislature had authority. The Legislature was not a party and did not need to be a party to the Second Addendum. The Second Addendum and the rights and responsibilities contained within it stand or fall by themselves. Act 4700 was needed solely to amend the CZMA, which was the responsibility of the Legislature. Joint App. 164a-165a. In 1986 the Legislature wanted WICO to be subject to the CZMA, and that is exactly what the Repeal Act does.

WICO's statements that the "Repeal Act by its terms, repudiates the Second Addendum *in its entirety*" and that "the Repeal Act completely abrogated the Second Addendum" are facially incorrect. WICO App. p. 17; WICO Motion p. 17, n. 15. (emphasis in original.) The Legislature could not have abrogated the Second Addendum even if that had been its express purpose. The Repeal Act repeals Acts 3326 and 4700 and separately requires WICO to comply with the CZMA. It does nothing more. Act 3326 authorized the Government of the Virgin Islands to join in the settlement of the United States' 1960 quiet title action. Act 4700 amended the CZMA to exempt WICO from its coverage and ratified the Second Addendum to that extent—the full and only extent of the Legislature's authority over the Second Addendum.

III. THE CZMA DOES NOT AFFECT WICO'S TITLE

WICO's misunderstanding of the CZMA is apparently based on its fundamental misunderstanding of the Repeal Act. This misunderstanding is made manifest at page 18 of its Motion. WICO claims there that "[b]y

reinstating the amended sections of the CZMA, the Government precluded itself from conveying title." It then goes on to cite sections 911(a)(1) and (d) of the CZMA for the proposition that "trustlands or submerged lands of the Virgin Islands" may only be developed under a nonrenewable lease.

The CZMA has nothing to do with WICO's title. WICO received whatever title it has from the United States. Sections 911(d)(1) and (2) make the obvious distinction between a permit, which is required for the private use of private land, and a lease, which is required for the private use of public land. If WICO has good title to the land for which it seeks a permit, then it only needs to seek a permit under (d)(1), not a lease under (d)(2). Contrary to WICO's claim, a permit is renewable and is not limited by statute to any specific term of years. § 911(d)(1); Joint App. 238a. WICO's citation to sections 911(a)(1) and 911(d) of the CZMA reflects its misunderstanding of that legislative act. The cited provisions apply only to those developers seeking a permit to develop trust land that is owned by the public. These provisions do not apply to developers who own the land on which they plan to develop, and WICO certainly considers itself an owner of the land in question here.

Contrary to WICO's assertion, the Legislature has never argued that "fee simple ownership may be equated with a renewable permit of unspecified duration . . . ." WICO Motion, p. 18 n. 16. WICO is confusing the concepts of title with the necessity to obtain an environmental permit to develop land in a coastal zone. Title refers to the underlying ownership of a parcel of land. A permit allows a particular use of land. Any landowner, no matter how secure its title, must obtain a permit or permits to develop in environmentally sensitive coastal lands anywhere in the Virgin Islands, or for that matter in many other states and territories.

It is true, as WICO argues, that the Repeal Act "reduces" it to "the status of a prospective applicant for CZMA permit" [sic]. WICO Motion p. 18. This is exactly what the Legislature had in mind when it passed the Repeal Act. WICO's "reduction" is simply to bring it within the same regulatory constraints as any other coastal developer.

The Repeal Act serves a "broad public purpose" (WICO Motion p. 19) because the CZMA serves such a purpose. When Congress turned over the submerged lands of the Virgin Island to the Virgin Islands, it did so as a matter of public trust "for the benefit of the people" of the Virgin Islands. Joint App. 194a. The CZMA was the Legislature's response to that obligation. It is the sole unified body of regulatory authority to protect the environmental integrity of all coastal lands, both public and private, now governed by the Virgin Islands.

IV. WICO HAS MISCONSTRUED THE REPEAL ACT'S LEGISLATIVE HISTORY AND THE EFFECT OF THAT HISTORY ON ITS TITLE

WICO goes to great lengths to quote snippets of the legislative debate surrounding the enactment of the Repeal Act in an attempt to show that "the principal, if not exclusive, issue was the repudiation of WICO's right to title to submerged lands." WICO Motion p. 10. Despite all the quoted language about colonial powers and trust land, WICO has conveniently neglected to acknowledge that the Repeal Act itself says nothing about title to the land WICO claims and, more importantly, that the result of the same legislative debate that WICO selectively quotes was to reject an amendment contesting WICO's title.

As explained at page 11 of the Legislature's Jurisdictional Statement, an amendment to the Repeal Act that would have designated the land in question as public was debated and put to a vote. That amendment would have

abrogated whatever title WICO received from the United States. Joint App. 181a-184a. WICO quotes directly from the consideration of that amendment in its Motion at the bottom of page 11 in footnote 13. *See also* WICO App. 46a-47a. The Legislature was thus presented with an explicit opportunity to declare that the Virgin Islands, not WICO, holds title to the harbor lands claimed by WICO. When counsel for the Legislature was asked what the affect of such an amendment would be, she replied as follows:

> MS. STRUDIVANT: Well, it would mean that the government has taken private property, and converted it into publicly owned property. It seems to me that it would constitute a taking under the constitution. And as such, the government would have to give some sort of compensation for that taking.

Joint App. 184a. Upon that advice the amendment failed by an 8 to 5 vote, with 2 legislators absent. *Id.* If the Legislature had intended to interfere with WICO's title it could have done so through this amendment. It did not, and nothing in the Repeal Act itself is to the contrary.

In that regard, it does not matter what individual legislators say when considering a bill, it is what they do. What they did was to pass a bill requiring WICO to comply with the CZMA and to obtain a permit—not a lease—subject to governmental ratification, and to defeat an amendment to that bill which would have taken WICO's title, such as it was.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction of this appeal.

Respectfully submitted,

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